FILED
OCT 3 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1527

In the

Supreme Court of the United States

ROBERT A. SCHMIDT, Sheriff,
Shawano County, Wisconsin,

Petitioner,

v.

JOSEPH L. VAN PATTEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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As the Petition for a Writ of Certiorari demonstrates, this case merits the Court's review because the Seventh Circuit exceeded its authority under the AEDPA when the court granted habeas relief to Van Patten. First, the Wisconsin state court did not act "contrary to . . . clearly established Federal law" when it concluded that counsel's telephonic participation in a change-of-plea hearing does *not* equate with no counsel at all. No decision of this Court "clearly establishe[s]" that the one-part "deficient performance" test of *United States v. Cronic*, 466 U.S. 648 (1984), rather than the two-part "deficient performance and consequent prejudice" test of *Strickland v.*

Washington, 466 U.S. 668 (1984), governed review of Van Patten's complaint of ineffective assistance of counsel. The AEDPA therefore barred the Seventh Circuit from granting Van Patten relief on his claim. Second, the Seventh Circuit also disregarded the AEDPA's restrictions when it substituted its factual conclusions for those of the Wisconsin state courts.

In his Brief in Opposition, Van Patten advances three principal grounds for denying the petition. First, absent a split in the circuits, a court of appeals decision violating the AEDPA does not warrant this Court's review (Br. in Opp. 11-14). Second, the Seventh Circuit correctly characterized Van Patten's case as "'materially indistinguishable'" from *Cronic* (Br. in Opp. 16; *see generally id.* at 14-20). Third, "[t]he Seventh Circuit did not substitute its own factual conclusions for those of the state courts" (Br. in Opp. 21). None of Van Patten's arguments withstands scrutiny.

I. THE NEED TO REVIEW VIOLATIONS OF AEDPA STANDARDS DOES NOT DEPEND ON A SPLIT AMONG THE CIRCUITS.

This Court has repeatedly granted certiorari when federal courts of appeals have declined to abide by the AEDPA's limitations — regardless of whether the circuits have split on the underlying legal issue. *See, e.g.*, *Rice v. Collins*, 126 S. Ct. 969 (2006); *Bradshaw v. Richey*, 126 S. Ct. 602 (2005) (*per curiam*); *Holland v. Jackson*, 542 U.S. 649 (2004) (*per curiam*); *Middleton v. McNeil*, 541 U.S. 433 (2004) (*per curiam*); *Mitchell v. Esparza*, 540 U.S. 12 (2003) (*per curiam*); *Woodford v. Visciotti*, 537 U.S. 19 (2002) (*per curiam*); *Early v. Packer*, 537 U.S. 3 (2002) (*per curiam*); *Bell v. Cone*, 535 U.S. 685 (2002).

The AEDPA establishes a highly deferential standard for federal review of State-level criminal convictions and

further identifies this Court's interpretations of federal law as the benchmarks against which lower federal courts measure a habeas petitioner's entitlement to relief. If federal courts instead grant habeas relief based on mere disagreement with State courts' legal and factual findings, those federal-court orders foil Congress's will in enacting the AEDPA. This frustration of Congressional purpose occurs regardless of whether the lower courts have divided on the underlying legal issue. This Court's grants of review in the cases cited above recognize the need to ensure that lower federal courts accord State courts' decisions the deference the AEDPA commands.

Had this Court adopted Van Patten's proposed approach, federal courts of appeal would have free reign to disregard the AEDPA's limitations whenever State courts address novel legal issues. As one of its precise goals in enacting the strict limitations found in the AEDPA, however, Congress sought to foreclose habeas relief when this Court has not clearly established the governing law. Here, the petition shows a substantial disregard by the Seventh Circuit of the strict standards of the AEDPA, and that disregard alone warrants this Court's review.

II. IN HOLDING THE FACTS IN VAN PATTEN'S CASE MATERIALLY INDISTINGUISHABLE FROM THOSE IN CASES REQUIRING APPLICATION OF *CRONIC*, THE SEVENTH CIRCUIT FAILED TO ACCORD THE WISCONSIN STATE COURTS THE HIGH DEGREE OF DEFERENCE REQUIRED BY THE AEDPA.

Van Patten acknowledges that "this Court has not addressed the precise situation of a lawyer's participation at a plea hearing by speakerphone" (Br. in Opp. 16). He then

echoes the Seventh Circuit's view that defense counsel's ongoing, active telephonic assistance during the plea hearing amounted to "'constructive absence' from the plea hearing" (Br. in Opp. 17), making his situation "'materially indistinguishable'" (Br. in Opp. 16) from a complete denial of counsel and therefore subject to *Cronic* rather than *Strickland*.

That approach to finding cases "materially indistinguishable" from each other, however, waters down AEDPA deference to a virtual nullity. Equating active, engaged telephonic assistance of counsel with a complete absence of counsel essentially converts the concept of "materially indistinguishable" into a fact-manipulating mechanism for circumventing the AEDPA's requirement that in habeas proceedings, federal courts accord a State court's decision a high degree of deference.

The danger in the Seventh Circuit's approach shows dramatically in the court's omission of the principal characteristic materially distinguishing Van Patten's circumstances from those in all the cases justifying application of *Cronic*. In asserting his claim of ineffective assistance, Van Patten repeatedly declared under oath that during the period leading up to the plea, his trial lawyer threatened and coerced him into changing his plea (Habeas Ans. Ex. J at 9, 13, 21, 22, 23, 48). Simultaneously, Van Patten asserted he wanted this same coercive lawyer to stand next to him at the plea hearing and that if his bullying defense counsel had stood next to him, he would not have entered the no-contest plea his lawyer intimidated him into making (*id.* at 13). The Wisconsin trial court recognized the absurdity of these incompatible claims (Pet. App. A49-A50), as did the federal district court (*id.* at A36).

By disregarding both the inherent, indisputable, and irreconcilable contradiction in Van Patten's claims against defense counsel and the Wisconsin trial court's response those claims, the Seventh Circuit conjured a

"materially indistinguishable" fact situation where there existed a fact situation readily and fundamentally distinguishable from those justifying the application of *Cronic*. In *Cronic*-type cases, a defendant asserts that he wanted a lawyer, yet did not get one, either actually or constructively, and both the performance deficiency and the resulting prejudice appear obvious and pervasive. Van Patten, on the other hand, actually had a lawyer available to provide advice throughout the proceeding. Then, unhappy with the outcome of the case (as the Wisconsin trial court found, *see* Pet. App. A50), Van Patten asserted a profoundly self-contradictory claim of ineffective assistance of counsel — a claim requiring significant inquiry into the circumstances of the representation in order to assess whether any deficient performance even occurred, much less whether any prejudice would inherently arise from whatever deficiency might have occurred. A claim that involves such effort does not correlate in any degree with "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 U.S. at 658. Consequently, a claim like Van Patten's requires applying *Strickland* (as the Wisconsin Court of Appeals did), not *Cronic* (as the Seventh Circuit did).

In short, despite Van Patten's efforts to contain the Seventh Circuit's decision within the bounds of the AEDPA, the circumstances of this case differ materially from those in *Cronic*-type cases. The Wisconsin Court of Appeals thus reasonably chose and applied the appropriate and "clearly established Federal law" when the court relied on *Strickland*. The Seventh Circuit violated the AEDPA when the court overturned the Wisconsin state court's decision and instead extended *Cronic* to Van Patten's materially distinguishable case.

III. THE SEVENTH CIRCUIT FAILED TO ACCORD AEDPA DEFERENCE TO THE FACTS FOUND IN THE WISCONSIN STATE COURTS.

In defending the Seventh Circuit's recitation of facts on which the court predicated its holding that *Cronic* rather than *Strickland* applied to his ineffective-assistance claim, Van Patten argues, essentially, that because *Cronic* applied, the Seventh Circuit's facts did not violate a federal court's obligation to grant deference to State courts' findings of fact (Br. in Opp. 21-22). Van Patten's argument, however, ignores the Seventh Circuit's explanation for its fact-finding: "In deciding whether to dispense with the two-part *Strickland* inquiry, a court must evaluate whether the 'surrounding circumstances make it unlikely that the defendant could have received the effective assistance of counsel'" (Pet. App. A7). The Seventh Circuit discussed its selected facts in order to determine whether *Cronic* applied, not (as Van Patten argues) because *Cronic* applied.

In selecting those facts, the Seventh Circuit had a clear obligation under the AEDPA to defer to facts found by a State court, 28 U.S.C. § 2254(e)(1), and, concomitantly, not to rely on facts resting on "a set of debatable inferences," *Collins*, 126 S. Ct. at 976. The petition shows that the Seventh Circuit did neither.

For example, Van Patten professes puzzlement about "debatable inferences" by the Seventh Circuit (Br. in Opp. 22). But as the petition noted, when the Seventh Circuit wrote that "[i]f Van Patten wished to converse with his attorney, anyone else in the courtroom could effectively eavesdrop" (Pet. App. A8), the court drew an inference "directly contradict[ing] Van Patten's own understanding of the circumstances at the plea hearing: during his testimony at the plea-withdrawal hearing, Van Patten concurred that the trial judge had advised that 'if [he]

wanted to talk to [his] attorney, if [he] had any questions, that they would set up a private place for [him] to talk' (Ex. J at 17)" (Pet. Cert. 25-26). A federal habeas court's declaration of a fact directly contrary to the habeas petitioner's uncontradicted against-interest statement of a fact all but defines a "debatable inference."

Likewise, when the Seventh Circuit wrote that "we cannot know what Van Patten might have done had he been treated like any other defendant with counsel at his side" (Pet. App. A9), the Seventh Circuit repudiated the Wisconsin trial court's disbelief in Van Patten's credibility. Rejecting Van Patten's contention, the Wisconsin trial court explicitly found that defense counsel did not coerce Van Patten (Pet. App. A49 ("you were not coerced into doing this")). The Wisconsin court dismissed Van Patten's credibility with the declaration that "you agreed to do what the record reflects you did; and I believe that everything that we heard since then is because you didn't like getting 25 years" (Pet. App. A50) — a credibility determination rejecting any truth in Van Patten's self-serving testimony that he would have refrained from entering his no-contest plea if defense counsel had stood in court with him.

Thus, contrary to Van Patten's contention, the Seventh Circuit substituted, at critical points, its factual conclusions for those of the Wisconsin state courts and evoked facts from "debatable inferences." The Seventh Circuit then based its decision on those improperly substituted facts. In doing so, the Seventh Circuit again violated the strictures of the AEDPA. That violation requires review and repudiation.

CONCLUSION

For the foregoing reasons, as well as those in the petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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October 3, 2006.